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No. 01-704

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

THOMAS LAMAR BEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF VIOLENCE POLICY CENTER AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF OF VIOLENCE POLICY CENTER AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF AMICUS[1]

The Violence Policy Center ("VPC") is a national non-profit organization working to reduce firearms violence through research, education, and advocacy. As the Court of Appeals below expressly noted, VPC's groundbreaking 1992 study of felons whose privileges to possess firearms were restored, VPC, *Putting Guns Back Into Criminals' Hands:*

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[1] Counsel for amicus curiae authored this brief in its entirety. No person or entity other than amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of the brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws (1992) ("VPC Report"),[2] spurred Congress into action, leading to the enactment and re-enactment of annual appropriations measures prohibiting the use of funds for the purpose of restoring any felon's opportunity to possess a firearm. (Pet. App. 5a.)

The Violence Policy Center is at the forefront of organizations working to reduce firearms violence in our nation. To this end, VPC analyzes a wide range of current firearm issues and provides information to policymakers, journalists, scholars, public health professionals, grassroots advocates, and members of the general public. Since its founding in 1988, VPC has released more than 60 studies and books which have helped shape firearms legislation and policy on the federal, state, and local levels while increasing public understanding of firearms violence as a public health issue. In addition, VPC's Litigation Project, established in 2001, has filed amicus curiae briefs in precedent-setting cases in the federal and state trial and appellate courts. As a result of its unique expertise, VPC is often relied on and cited by national news outlets and other organizations. Its staff, which includes lawyers and health policy analysts, are nationally recognized experts on firearms violence, firearms manufacture, federal firearms law and the agencies empowered to enforce such laws (such as the Department of Justice and the Bureau of Alcohol, Tobacco and Firearms), and firearms litigation. VPC respectfully submits this brief in support of Petitioner the United States, urging reversal of the decision of the Court of Appeals.

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[2] The VPC Report appears on the Violence Policy Center's Web site at http://www.vpc.org/studies/reliefcont.htm. The three parts of the study appear without pagination at the following URLs:

http://www.vpc.org/studies/reliefone.htm ("Link 1");
http://www.vpc.org/studies/reliefwo.htm ("Link 2");
http://www.vpc.org/studies/reliefthree.htm ("Link 3").

STATUTORY AND FACTUAL BACKGROUND

Federal law prohibits felons from possessing, transporting, or shipping firearms or ammunition. 18 U.S.C. § 922(g)(1). This proscription dates to the 1938 Federal Firearms Act, which barred receipt of firearms by individuals convicted of a "crime of violence." Pub. L. No. 75-785, 52 Stat. 1250. Over the decades that followed, Congress expanded that prohibition until it encompassed virtually all crimes, including non-violent offenses, "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).[3]

Congress amended the 1938 Federal Firearms Act in 1965 to permit convicted felons to petition the Secretary of the Treasury for relief from the prohibition set forth in Section 922(g)(1). Accordingly, a convicted felon could apply to the Secretary of the Treasury to restore the ability to possess a firearm upon a showing that the felon "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). This provision was enacted after Olin Mathieson Corporation had been convicted of felony counts pertaining to an overseas kickback scheme. *See* VPC Report at Link 1; *United States v. Olin Mathieson Chem. Corp.*, 368 F.2d 525 (2d Cir. 1966) (per curiam) (upholding conviction). Because strict application of the statu-

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[3] *See* Act of Mar. 10, 1947, Pub. L. No. 80-14, 61 Stat. 11 (adding burglary, house breaking, and assault); Act of Oct. 3, 1961, Pub. L. No. 87-342, 75 Stat. 757 (adding the language currently in Section 922(g)(1)); Gun Control Act of 1968, Pub. L. No. 90-616, 82 Stat. 1212.

The statute still exempts certain white-collar offenses. *See* 18 U.S.C. § 921(a)(20)(A) ("The term 'crime punishable by imprisonment for a term exceeding one year' does not include—(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.").

tory prohibition would have driven Winchester—a gun and ammunition manufacturer that was an Olin Mathieson subsidiary, *see* VPC Report at Link 1—out of business, Congress granted the Secretary of the Treasury discretionary authority to make exceptions in appropriate cases. The Secretary of the Treasury subsequently delegated authority to the Director of the Bureau of Alcohol, Tobacco, and Firearms ("ATF") to grant or deny such applications after an investigation. *See* 27 C.F.R. § 178.144(b) & (d).

In 1986, Congress passed the McClure-Volkmer Act. *See* Pub. L. No. 99-308, 100 Stat. 449. This Act amended Section 925(c) to permit felons who had been convicted of crimes involving a firearm, had been committed involuntarily to a mental institution, or had violated the Gun Control Act of 1968 to petition ATF for restoration of their firearms privileges. *See id.* § 105, 100 Stat. 449, 459; *see also Stop Arming Felons Act: Hearing on S.2304 Before the Subcomm. on the Constitution Before the Senate Comm. on the Judiciary*, 101st Cong. 42 (1992) (testimony of Josh Sugarmann, Executive Director of Violence Policy Center) ("Sugarmann testimony") (noting that the McLure-Volkmer Act had been drafted by the National Rifle Association).

From 1985 until 1991, ATF maintained approximately forty full-time staff members to review Section 925(c) applications and spent in excess of $21 million conducting more than 22,000 investigations. VPC Report at Link 1. ATF's investigations were "comprehensive": agents conducted a preinvestigation interview of the applicant; researched the applicant's conviction, employment history, law enforcement record, and mental competency; and interviewed "regional law enforcement agencies, neighbors, friends, business associates, and arresting and probation officers." *Id.* The statute makes plain that the decision to grant a Section 925(c) application rests in sound discretion of the Secretary. *See* 18 U.S.C. § 925(c) ("[T]he Secretary may grant such relief if it is established to his satisfaction . . . ."); 27 C.F.R.

§ 178.144(d) ("The Director may grant relief to an applicant if it is established to the satisfaction of the Director . . . .").

Congress provided for circumscribed judicial review limited to denials of applications: "Any person whose application for relief from disabilities is *denied* by the Secretary may file a petition with the United States district court for . . . a judicial review of such denial." 18 U.S.C. § 925(c) (emphasis added). This judicial review, pursuant to the Administrative Procedures Act, is limited to determining whether the agency action was "arbitrary and capricious." 5 U.S.C. § 706(2)(A).

The Violence Policy Center first focused on ATF's "relief" for felons program after it became aware that Alan Gottlieb, the Chairman of the Citizens Committee for the Right to Keep and Bear Arms, a gun rights organization, regained firearms privileges in 1989, after having been convicted of tax evasion in 1984. *See* Sugarmann Testimony, *supra*, at 42. VPC commenced an investigation, expecting to find a selective program granting "relief" to a few felons, most of whom had committed white collar crimes. *See id.* Instead, VPC discovered that ATF had restored the firearms privileges of thousands of felons, whose crimes included sexual assault, drug dealing, terrorism, homicide, and armed robbery. *See id.* at 42-43.

In May 1992, VPC released a landmark report, entitled *Putting Guns Back Into Criminals' Hands: 100 Case Studies of Felons Granted Relief from Disability Under Federal Firearms Laws*, that detailed its investigation of the Section 925(c) "relief" program. The VPC Report revealed that, between 1982 and 1992, ATF had granted approximately one third of the more than 22,000 applications it processed. VPC Report at Link 1. Moreover, ATF had increased its annual expenditures on Section 925(c) investigations from $2.7 million in 1985 to $4.2 million in 1991. *Id.*

Disturbingly, the VPC Report found that ATF granted applications to restore gun privileges to several individuals despite strong evidence obtained in ATF investigations suggesting that such individuals might use firearms to threaten others:

- Jon Wayne Young, 19, had a six-year history of sex-related offenses when he pled guilty to aggravated assault and aggravated robbery in 1976. The sentencing judge stated: "You don't have enough control of your actions to prevent [yourself from killing someone.] It is just lucky, fortunate, that the girl wasn't killed, and the reason probably that she wasn't killed is that she submitted to you but had she fought you undoubtedly she might have been killed, probably would have been killed." ATF restored Young's gun privileges in 1989. *See id.*

- Jerome Sanford Brower conspired with former CIA agents Edwin Wilson and Francis Terpil to supply explosives to a terrorist training program in Libya. In 1981, Brower pled guilty to violations of the Arms Export Control Act and unlawfully transporting hazardous material in foreign commerce. After receiving a four-month prison sentence and a $5,000 fine, Brower applied for restoration of his gun privileges in 1985. ATF granted his request. *See id.*

Moreover, even in cases involving firearms-related offenses, ATF granted these applications:

- One unnamed applicant omitted two convictions—one for burglary and another for brandishing a firearm—from his Section 925(c) application because he "couldn't remember the exact dates." ATF granted the application. *See id.* at Link 3.

- Bobbie Sherrell Holaway had a laundry list of convictions, including dealing in explosives and carrying a firearm without a license. ATF granted the application. *Id.*

- Sherman Dale Williams was a convicted felon who had illegally transferred machine guns. His neighbors described him as having "a reputation as a crook" and stated that "if he were allowed to own firearms," they hoped that he would use them "somewhere else and not in [their] neighborhood." The investigating agent concluded that "[d]uring this investigation, the law enforcement community and a few neighbors expressed great concern [regarding Williams'] being granted relief, however, no documentable reasons for denying him his relief were produced. Because of this lack of documentation, I have no choice but to recommend that [he be] granted relief." *Id.*

With this pattern of granting relief, the VPC Report unsurprisingly found that many felons whose firearm privileges were restored under Section 925(c) used those firearms to commit further crimes, including many violent crimes. This was true even where the underlying crime resulting in the loss of firearms privileges was not a violent one. *See* VPC Report at 13 ("The severity of the original crimes compared with subsequent crimes committed effectively illustrates the futility in attempting to predict future criminal behavior based on a felon's criminal past."); *see also* VPC, *Guns for Felons: How the NRA Works to Rearm Criminals* 9 (Mar. 2000), *available at* http://www.vpc.org/studies/felons.htm ("VPC 2000 Report") (citing instances where individuals, having lost their privileges upon conviction for non-violent crimes, had those privileges restored and then committed firearms-related offenses). As VPC demonstrated in a subsequent report, 69 felons granted "relief" between 1985 and 1992 were rearrested thereafter for crimes ranging from trafficking in controlled substances and possession of illegal weapons to sexual assault, abduction-kidnapping, child mo-

lestation, and domestic abuse. *See* VPC 2000 Report (documenting recidivism among felons granted Section 925(c) "relief").

Congress's response to the VPC Report was swift and decisive: Congress defunded the Section 925(c) "relief" program, expressly eliminating the previous broad discretionary authority granted to the Secretary to grant this "relief." The 1992 appropriations law stated that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)."[4]

Subsequent appropriations bills have permitted ATF to process applications filed on behalf of corporations, the entities originally intended to benefit from Section 925(c) "relief."[5] But Congress's determination that individuals convicted of felonies should not be permitted under federal law to possess, transport, or ship firearms or ammunition has been validly enacted into law each year since 1992.

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4 Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1993).

5 *See* Treasury and General Government Appropriations Act, Pub. L. No. 107-67, 115 Stat. 514, 519 (2002) ("Provided further, That such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. section 925(c)"); Consolidated Appropriations Act, Pub. L. No. 106-554, 114 Stat. 2763 (2001); Treasury and General Government Appropriations Act, Pub. L. No. 105-61, 111 Stat. 1277 (1998); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1997); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 104-52, 109 Stat. 471 (1996); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-329, 108 Stat. 2385 (1995); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-123, 107 Stat. 1228 (1994).

Despite this clear statutory statement of congressional intent, the Court of Appeals nevertheless held that district courts retained authority to "review" the Secretary's inability to act. Moreover, the Court of Appeals held that district courts, upon such judicial "review," could directly grant relief to convicted felons, restoring their firearms privileges under Section 925(c).

SUMMARY OF ARGUMENT

Every annual appropriations law for the Department of the Treasury since 1992—the year in which VPC published its report—has provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." *See supra* at 8 n.5.

The Court of Appeals misconstrued this language and ignored Congress's unambiguous intent behind it. The Court of Appeals itself correctly concluded that Congress in fact intended to "abrogate" the right to seek both "administrative *and* judicial" relief from the firearms disability (Pet. App. 9a.) (emphasis added). The Court of Appeals then erroneously applied a form of heightened scrutiny to the appropriations legislation and required Congress to be more "direct and definite" to accomplish its objective in an appropriations provision. (*Id.*) The Court of Appeals should not have imposed this additional requirement. Once a court has determined Congress's intent, there is no basis—indeed, no authority—for the court to prefer (much less demand) one form of legislation over another. "So long as the method chosen by Congress is constitutional, then it matters not that alternative methods exist" to achieve the same end. *United States v. Villamonte-Marquez*, 462 U.S. 579, 591 n.5 (1983).

The text, structure, and legislative history of the appropriations laws all confirm that the Court of Appeals should not have overridden Congress's unambiguous intent to suspend the restoration of firearms privileges under Section

925(c). As a textual matter, the statute only grants courts jurisdiction over the "denial" of a petition, and ATF ceased "den[ying]" petitions when Congress forbade it from "acting upon" them. Structurally, the narrow judicial review envisioned by Section 925(c) cannot sensibly occur without the predicate administrative investigation and determination by ATF, which Congress has prohibited. Finally, the legislative record confirms that by defunding any ATF action on Section 925(c) petitions, Congress intended to preclude the courts from acting on such petitions.

VPC encourages the Court to adopt the conclusion of the Third Circuit in *Pontarelli v. ATF*, No. 00-1268, 2002 U.S. App. LEXIS 5309 (Mar. 29, 2002). There, the court, sitting en banc, overruled its own prior circuit precedent, and, in a comprehensive opinion on the issues, sided with all of its sister circuits (except the Fifth). That Court aptly summarized the essential flaws of the Fifth Circuit's view:

> We decline to follow *Bean* because . . . it ignored the texts of § 925(c) and the appropriations ban, departed from Supreme Court precedent on when an appropriations act can change a substantive statute and distorted the legislative history of the appropriations ban.

Id. at *5 n. 4.

ARGUMENT

I. CONGRESS CAN—AND DID—VALIDLY AND REPEATEDLY SUSPEND THE OPERATION OF SECTION 925(c) THROUGH APPROPRIATIONS LEGISLATION.

This Court has repeatedly held that Congress may alter statutes through appropriations legislation. *See, e.g., Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992). Yet in disregarding Congress's clear expressed intent to suspend the operation of Section 925(c), the Court of Appeals relied heavily on the principle that repeals by "implication" are disfavored, particularly where the "repeal" is to be implied from appropriations legislation. (Pet. App. 7a.) That principle does not apply here. This case does not involve any "implicit" repeal of Section 925(c). Rather, the relevant appropriations provisions have *expressly* suspended ATF's power to act. As a result, there is no "denial" of a petition, and therefore no predicate for judicial review.

"[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it [may] accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *United States v. Will*, 449 U.S. 200, 222 (1980) (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)) (omission and second brackets in original). In such situations, courts will not presume that a provision enacted as part of an appropriations statute "amend[s] substantive law," unless Congress said so "clearly." *Robertson*, 503 U.S. at 440. But where Congress makes its intention clear, the judicial task is complete. "So long as the method chosen by Congress is constitutional, then it matters not that alternative methods exist" to achieve the same end. *United States v. Villamonte-Marquez*, 462 U.S. 579, 591 n.5 (1983); *see also Dickerson*, 310 U.S. at 561 (noting that Congress's preference of one legislative formulation over another is "not an

infallible guide to legislative intent, and cannot overcome more persuasive evidence where, as here, it exists").

The practice of using appropriations legislation to enact substantive law is longstanding. *See, e.g.*, *Robertson*, 503 U.S. 429 (holding that Congress altered certain environmental laws through subsequent appropriations legislation); *Dickerson*, 310 U.S. 554 (holding that Congress reduced reenlistment allowances through appropriations legislation); *United States v. Mitchell*, 109 U.S. 146 (1883) (holding that Congress reduced salaries for Indian interpreters in appropriations legislation); *see also Will*, 449 U.S. 200 (upholding Congress's power not to give judges a cost-of-living adjustment prior to the COLA taking effect). Congress also routinely restricts the use of federal funds in connection with appropriations legislation. For example, the Hyde Amendment, enacted every year since 1976, bars the use of funds appropriated under the Medicaid Act for abortions except in limited circumstances. *See, e.g.*, *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 475-77 (1996) (per curiam) (discussing Hyde Amendment).

Congress's suspension of Section 925(c) is another example of this common and unobjectionable practice. It cannot be doubted that Congress has spoken clearly to the point at issue here. Each year for the past decade, Congress has approved and the President has signed legislation stating that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)." In the face of this unambiguous statement, it is unsurprising that even the Court of Appeals agreed that Congress can and has prevented action by ATF. (Pet. App. 9a.) The only question, therefore, is whether the statute reflects a congressional intent to authorize district courts to rule on Section 925(c) applications without the benefit of a prior administrative determination.

In holding that Congress had not precluded the availability of judicial review of the "denial" of a Section 925(c) petition, the Court of Appeals relied heavily on the principle that repeals by implication are disfavored (*see* Pet. App. 7a (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978))), "especially" when the repeal is "implied" from an appropriations law. *See also Robertson*, 503 U.S. at 440 ("[R]epeals by implication are especially disfavored in the appropriations context.").

The Court of Appeals failed to appreciate, however, that at bottom the judicial task, as in *Hill*, is limited to discerning Congress's intent. In *Hill*, this Court was appropriately skeptical of the notion that an intent to repeal a statute could be discerned from a decision to fund a project that arguably conflicted with that statute. This Court therefore found, as a matter of statutory construction, that a repeal of substantive law would not lightly be inferred from an appropriations provision:

> When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute *which might prohibit the expenditure*.

437 U.S. at 190 (emphasis added). In other words, Congress should not be presumed to have intended to repeal a prior law simply by funding a project that may conflict with it.

In this case, however, there is no such ambiguity as to Congress's intent to suspend Section 925(c). Unlike an outright repeal of the legislation, *see Robertson*, 503 U.S. at 440, suspension of the legislation in the appropriations bill (as in this case) effectively forces Congress to revisit the issue each year as part of the annual appropriations process. *See Meek*

v. Pittenger, 421 U.S. 349, 372 (1975) (noting that "[t]he recurrent nature of the appropriation process guarantees annual reconsideration" of legislation), *overruled on other grounds by Mitchell v. Helms*, 530 U.S. 793 (2000). As a result, by having to revisit the issue annually during the appropriations process, Congress can speak far more clearly than if it were to act on a single occasion. *Cf. Robertson*, 503 U.S. at 440 (amendment through single act); *Barnhart v. Walton*, No. 00-1937, slip op. at 7-8 (U.S. Mar. 27, 2002) (finding that Congress intended interpretation of law where Congress frequently amended bill but left agency's longstanding interpretation undisturbed). Congress's consistent use of the same language in each appropriations measure only reinforces Congress's clear intent. *Cf. Dickerson*, 310 U.S. at 561-62 (finding that Congress spoke sufficiently clearly in suspending legislation through appropriations process even where legislative language differed across different years' appropriations laws).[6]

The Court of Appeals failed to respect Congress's conscious legislative choice. Inexplicably repudiating its prior panel decision and upholding the district court's decision, the panel in this case held that Congress had not spoken with sufficient clarity to suspend operation of the judicial review provision of Section 925(c). As Part II demonstrates, the text and structure of Section 925 made it obvious that by suspending ATF's power to act, Congress had mooted the judicial review provision.

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[6] In light of this repeated congressional action, it cannot plausibly be maintained that the passage of time supported the Court of Appeals decision to reverse its own precedent and reinstate the judicial review of Section 925(c) petitions. *See Bean v. ATF*, 253 F.3d 234, 237 (5th Cir. 2001).

II. CONGRESS'S SUSPENSION OF ATF'S POWER PREVENTS ACTION BY THE DISTRICT COURTS.

The Court of Appeals held that although the appropriations provision disabled ATF from acting on a petition, judicial review of the "denial" was nevertheless available under Section 925(c). The implicit conclusion from this holding is that Congress would intend for judicial review to be available, in the absence of any prior administrative determination. That conclusion is unsupportable. To the contrary, the statutory structure makes clear that the provisions for judicial review cannot sensibly have meaning before an investigation by the Secretary and a denial of the petition.

A. Congress Stripped the District Courts of Jurisdiction.

It is axiomatic that federal courts possess only that jurisdiction the Constitution permits and statutes provide. *See, e.g., Finley v. United States*, 490 U.S. 545, 547-48 (1989). Congress is not obligated to grant district courts the power to review agency decisions, and district courts may only hear such appeals to the extent of a jurisdictional grant. *See, e.g., Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 672-73 (1986) (stating that while presumption exists in favor of judicial review of agency decisions, Congress can, subject to constitutional limits, override that presumption); *Califano v. Sanders*, 430 U.S. 99, 108-09 (1977) (holding that absent constitutional challenge federal courts lack jurisdiction to review final decision refusing to reopen a claim for social security benefits).

Section 925(c) provides that "any person whose application for relief from disabilities is *denied* by the [ATF] may file a petition with the United States district court for the district in which he resides for a judicial *review of such denial*." 18 U.S.C. § 925(c) (emphasis added). This language makes clear that before the courts can act, ATF must *deny* a per-

son's application. As several federal appeals courts have concluded, this requirement is jurisdictional. *Saccacio v. ATF*, 211 F.3d 102, 104 (4th Cir. 2000) (Luttig, J.); *Owen v. Magaw*, 122 F.3d 1350, 1354 (10th Cir. 1999); *Burtch v. United States Dep't of Treasury*, 120 F.3d 1087, 1090 (9th Cir. 1997).

A "denial" is "'an adverse determination on the merits,' rather than merely 'a refusal to act.'" *Saccacio*, 211 F.3d at 104 (quoting *Burtch*, 120 F.3d at 1090); *see also McHugh v. Rubin*, 220 F.3d 53, 60-61 (2d Cir. 2000). Other aspects of Section 925(c) reinforce this definition. Section 925(c)'s statement permits district courts to "admit *additional* evidence where failure to do so would result in a miscarriage of justice." 18 U.S.C. § 925(c) (emphasis added). Because courts are limited to "review[ing] [a] denial," their power to admit "additional" evidence presupposes that *some* evidence must have been considered by the administrative agency. "If the district courts were intended, based upon the text of the statute, to make an initial determination independent of the Secretary, then presumably the statute would not provide for the admission of additional evidence and the standard by which to admit that evidence—namely, the evidence of a miscarriage of justice." Ryan Laurence Nelson, *Rearming Felons, Federal Jurisdiction under 18 USC § 925(c)*, 2001 U. Chi. Legal F. 551, 565. The notion that a district court might conduct the entire investigation on its own is therefore flatly inconsistent with this statutory scheme. In fact, since the funding restrictions were put into place, ATF has not admitted any evidence nor denied a single application. The predicate for judicial review—a denial of relief by ATF—is therefore necessarily absent. *See, e.g.*, *Pontarelli*, 2002 U.S. App. LEXIS 5309, at *24 ("This language unambiguously makes 'denial' a jurisdictional prerequisite.").

B. The Statutory Structure of Section 925(c) Supports the View that Congress Did Not Intend for Courts To Rule on Applications To Restore Firearm Privileges Absent a Prior Administrative Determination.

Where questions of statutory interpretation cannot be resolved on the basis of the plain language alone, this Court routinely consults the statutory structure. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). A statute's structure can clarify an ambiguity in its literal language. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). Interpretations inconsistent with that structure and context should be rejected. *See, e.g.*, *FBI v. Abramson*, 456 U.S. 615, 625 (1982).

The statutory structure here makes plain that Congress accorded the Secretary of the Treasury broad discretion to determine whether to restore a felon's firearms privileges. That discretion was subject only to exceedingly narrow judicial review. Because the judicial role is entirely dependent on ATF's developing a factual record and reaching a judgment based thereon, it is common sense that Congress intended, by defunding ATF's role, to eliminate the availability of relief. Indeed, to believe that Congress intended the courts to review decisions—where no record exists and no decision was made—would ascribe complete irrationality to Congress.

Two specific aspects of the statute highlight the broad discretion granted to the Secretary of the Treasury (prior to Congress's decision to defund the program) and demonstrate the impossibility of "reviewing" the "denial" of a petition under Section 925(c) in the absence of a predicate determination. First, Section 925(c) vests the *Secretary* with the wide discretion to decide whether an applicant has satisfied the

statutory preconditions to a restoration of firearms privileges. Like many statutes, Section 925(c) lists a series of conditions that an applicant must satisfy before his privileges may be restored. *See* 18 U.S.C. § 925(c) (applicant not dangerous to public safety and restoration of rights not contrary to the public interest). But the statute does not automatically entitle an applicant to relief upon proof of these statutory criteria. To the contrary, the statute specifies that these preconditions must be established to the *Secretary's* satisfaction. *See id.* (providing that Secretary may restore rights if criteria are "established to *his* satisfaction") (emphasis added). When the Secretary—as directed by Congress—does not conduct an investigation into the satisfaction of the specified criteria, a court cannot meaningfully determine, on "reviewing" the denial, that the criteria are satisfied to the *Secretary's* satisfaction. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (courts should "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested") (internal quotation marks and citation omitted).

Second, even when the statutory criteria have been established to the Secretary's satisfaction, Section 925(c) affords the Secretary of the Treasury an additional layer of discretion. In such cases, the statute does not compel the Secretary to restore the applicant's rights. Instead, the statute explicitly provides that the Secretary "may" restore these rights. 18 U.S.C. § 925(c). Again, this broad grant of discretion cannot be squared with a view of the statute that would permit judicial "review" in the absence of an administrative record or a determination by the Secretary. *See Pontarelli*, 2002 U.S. App. LEXIS 5309, at *25 ("That Congress gave the Secretary broad discretion to apply such an amorphous

standard suggests that it wanted an administrative agency, not district courts, to decide whether to restore felons' firearms privileges.") (internal quotation marks and citation omitted).

This Court's prior treatment of Section 925(c) respects Congress's carefully crafted scheme of administrative relief. This Court repeatedly has described Section 925(c) as creating a system of administrative remedies. *See Beecham v. United States*, 511 U.S. 368, 373 n* (1994) (describing Section 925(c) as allowing "*the Secretary of the Treasury* to grant relief from the disability imposed by § 922(g)"); *ATF v. Galioto*, 477 U.S. 556, 559 (1986) (noting that the newly enacted scheme permitted "*the Secretary* to grant relief"); *Lewis v. United States*, 445 U.S. 55, 57, 64 (1980) (repeatedly emphasizing that an aggrieved felon may apply to have his firearms privileges restored by obtaining "permission from *the Secretary of the Treasury*") (emphasis added in all quotations). *Galioto* characterized the process of seeking restoration of one's firearms privileges as an *administrative* process, explained that the statutory scheme "*permit*[*ted*] the Secretary to grant relief" and explicitly described the relief provided under Section 925(c) as an "administrative remedy." 477 U.S. at 559 (emphasis added).

Because the statute entitles applicants only to an "administrative remedy," judicial review of that determination is sharply restricted. A court reviewing the denial of a Section 925(c) application does not conduct a *de novo* hearing. Instead, the Administrative Procedure Act ("APA") governs any review. *See, e.g.*, *Mullis v. United States*, 230 F.3d 215, 219 (6th Cir. 2000) (collecting cases); *Bagdonas v. ATF*, 93 F.3d 422, 425 (7th Cir. 1996); *Bradley v. ATF*, 736 F.2d 1238, 1240 (8th Cir. 1984) (applying the APA to review denial of application to restore firearms privileges); *Kitchens v. ATF*, 535 F.2d 1197, 1199-1200 (9th Cir. 1976) (per curiam)

(same).[7] Under the APA's "narrow" standard of review, *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the Secretary's denial of a petition may be reversed only if it is "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with the law." 5 U.S.C. § 706. Administrative action fails that standard only where it is not supportable on any rational basis. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).[8]

Independent judicial rulings on Section 925(c) applications—such as that conducted by the District Court in this case and sanctioned by the Court of Appeals—are flatly inconsistent with the scheme of deferential "arbitrary and capricious" review envisioned by Congress. Where Congress has prohibited the Secretary of the Treasury from "investigat[ing]" or "act[ing] upon" Section 925(c) applications, the Secretary's refusal to rule on those applications could hardly be "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with the law." Indeed, by refusing to "act on" an application to restore firearms privileges, the Director of ATF is acting in a manner "in accordance with the law."

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[7] Even prior to the enactment of the 1986 amendment adding the judicial review provision, courts reviewed the Secretary's determination under the Administrative Procedure Act. *See, e.g.*, *Kitchens*, 535 F.2d at 1199-1200. The 1986 judicial review provision merely redefined the standard under which the court could consider evidence outside the administrative record.

[8] Section 925(c) does permit the reviewing court to "admit additional evidence where failure to do so would result in a miscarriage of justice." Nonetheless, even after considering this additional evidence, the district court could only require that the Secretary (or ATF) reconsider its decision in light of the additional evidence. As the legislative history suggests, the Secretary of the Treasury would determine, in light of that evidence, whether to exercise discretion to grant relief from the proscription of Section 922(g). *See* S. Rep. No. 99-583, at 27 (1984); S. Rep. No. 97-476, at 24 (1982).

C. The Lower Court's Position Is Inconsistent With Two Separation-of-Powers Principles that Should Guide the Proper Interpretation of Section 925(c) and the Suspending Legislation.

In two key respects, the Court of Appeals wrongly arrogated to courts a traditionally executive function.

First, the Court of Appeals' implicit conclusion that a court can directly restore one's firearms privileges, rather than remand the matter back to the agency, blurs the line between the judicial and executive functions. Section 925(c) does not explicitly authorize a court to restore an applicant's firearms privileges. The statute by its terms limits the judicial role to "reviewing" the Secretary's denial of those applications. And while courts typically have broad equitable authority to grant proper relief, *see* 28 U.S.C. § 1651(a), direct judicial restoration of firearms privileges—rather than an order directing an executive branch official to do so—may well exceed its remedial power. This Court has long held that "review" under the APA's "arbitrary and capricious" standard merely entitles the court to vacate the Secretary's denial of relief and to remand the matter for further proceedings. *See, e.g.*, *State Farm*, 463 U.S. at 57 (finding agency action "arbitrary and capricious" and remanding case to lower court with directions to remand matter to agency). A court-ordered restoration of firearms privileges under this scheme flaunts that practice.

In this case, the relevant appropriations provisions bar ATF not only from conducting an "investigation" of a petition filed under Section 925(c), but more broadly from "acting" on any such petition. Presumably because that statutory prohibition would preclude ATF from restoring a felon's firearms privileges, even following review of a "denial," the Court of Appeals implicitly concluded that Congress authorized the court to restore these privileges directly. Because this construction of the statute would raise serious constitu-

tional difficulties on separation-of-powers grounds, it should not lightly be reached.

Second, the Court of Appeals' decision fails to recognize the respective branches' proper roles in investigating applications. Investigation, including the preliminary investigation of a felon's suitability to reacquire his firearms privileges, is a quintessentially executive function. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to . . . enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.") (collecting cases); *cf. Morrison v. Olson*, 487 U.S. 654, 706 (1988) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."). Congress recognized the executive branch's unique ability to fulfill this role by vesting it with the power to investigate applications to restore firearms privileges. *See* 18 U.S.C. § 925(c) (providing that applications may be granted if the statutory criteria are established to the Secretary's satisfaction). Each of the appropriations laws prohibits the expenditure of funds for "investigat[ing]" applications to restore firearms privileges. As Congress was well aware when it decided whether to suspend the program, such investigations are difficult, sensitive, and fact-intensive processes requiring the expenditure of substantial time and resources to evaluate an applicant's suitability for restoration of his privileges. A typical investigation in connection with a Section 925(c) application involves extensive interviews with the applicant, character references, neighbors, employers and probation officers as well as accumulation of all evidence bearing on whether the applicant is likely to act in a manner dangerous to public safety and whether relief would be contrary to the public interest. *See generally Smith v. Brady*, 813 F. Supp. 1382, 1383-84 (E.D. Wis. 1993) (describing ATF's procedures when investigating Section 925(c) applications); *see also Pontarelli*, 2002 U.S. App. LEXIS 5309, at *44-45 ("Evaluating a § 925(c) application requires a detailed investigation of the felon's background and recent conduct. An effective investigation entails interviewing a wide array of people, including the felon, his family, his friends, the persons whom he lists as character references, members of the community where he lives, his current and former employers, his coworkers, and his former parole officers.") (citations omitted); VPC Report at Link 1.

In contrast to the executive branch, courts are poorly situated to conduct the investigations necessary to determine whether an applicant's privileges should be restored. "[I]n certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed." *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958). Specifically in the context of Section 925(c) applications, "[w]hile district courts are well equipped to make credibility judgments and factual determinations, they are without the tools necessary to conduct a systematic inquiry into an applicant's background." *Mullis*, 230 F.3d at 219. Likewise, courts lack the power, on their own initiative, to identify and to interview the various witnesses who could offer relevant testimony or observations on the suitability of a particular applicant for restoration of those privileges. *Cf. Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 365-66 (1998) (recognizing the differences between trials and administrative hearings in the context of parole revocation hearings).

Instead, in a trial, courts must rely solely on the factual development provided by the parties through their own initiative and acquired through the discovery process. *See, e.g.*, *Pontarelli*, 2002 U.S. App. LEXIS 5309, at *45 ("Because courts are without the tools necessary to conduct a systematic inquiry into an applicant's background, if they reviewed applications de novo they would be forced to rely primarily—if not exclusively—on information provided by the felon. As

few felons would volunteer adverse information, the inquiry would be dangerously one-sided.") (internal quotation marks and citations omitted). That process, however, is an inadequate substitute for the information that can be developed through the full investigation that Congress envisioned prior to any decision on whether to restore firearms privileges. *See Volpe*, 401 U.S. at 419-20 (noting that evidence offered by parties in judicial proceeding supply "inadequate basis for review" of agency decision and remanding matter to lower courts to consider decision in light of the "full administrative record that was before the Secretary at the time he made his decision"). It is especially inadequate in this case because the appropriations legislation prevents ATF from "investigat[ing]" the reasons why a particular application should be denied. As a result, any court deciding whether to grant an application to restore privileges will have before it an inadequate picture from which to render a decision.[9]

The Court of Appeals ignored ATF's unique ability to perform this investigative function. Instead, it effectively deputized district courts to serve as surrogate investigators for any petition to restore firearms. In light of the substantial differences between the respective abilities of the executive branch and the courts to conduct the necessary factual development prior to any decision on an application, Congress hardly could have intended this reallocation of authority from one branch to another. Indeed, Section 925(c) itself suggests that Congress never intended for courts to serve as the predominant forum for factual development and initial adjudication of Section 925(c) applications. By providing that courts only could consider evidence outside of the administrative record where a miscarriage of justice otherwise would result,

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9 Thus, the district court in this case was flatly wrong when it suggested that it was well positioned to decide whether to restore Bean's firearms privileges absent any administrative record. (Pet. App. 28a-29a.)

Congress narrowly cabined courts' roles. *See Pontarelli*, 2002 U.S. App. LEXIS, at *44 ("District courts' institutional limitations suggest that Congress could not have intended for the appropriations ban to transfer to them the primary responsibility for determining whether to restore felons' firearms privileges."). It would be absurd to think that, by stripping the executive agency's role in investigating applications, Congress intended the federal district courts to step into their shoes. Such a result ignores the intelligible division of roles between the executive and judicial branches that underpins the Section 925(c) application system.

III. THE LEGISLATIVE HISTORY, LIKE THE STATUTORY STRUCTURE, MAKES CLEAR CONGRESS'S INTENT TO STOP RE-ARMING FELONS.

The legislative history confirms Congress's manifest intent to suspend the operation of Section 925(c). Congress acted swiftly and decisively in response to the 1992 VPC report to end the federal program providing for re-arming convicted felons. In taking this action, Congress did not intend to have federal courts replace ATF as the government officials handing back firearms to felons. As Senator Simon stated on the Senate floor: "Let me make this point perfectly clear: It was never our intent, nor is it now, for the courts to review a convicted felon's application for firearm privilege restoration." 142 Cong. Rec. S12164 (daily ed. Oct. 2, 1996).[10] By contrast, "not a single member of Congress suggested that the appropriations ban would give courts the au-

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10 *See also id.* (daily ed. Oct. 2, 1996) (statement of Senator Simon) ("A recent court case in Pennsylvania misinterpreted our intentions and opened the door for these convicted felons to apply for judicial review of their disability relief applications."). Senator Simon, of course, was criticizing the Third Circuit's decision in *Rice v. United States*, 68 F.3d 702 (3d Cir. 1995), which the en banc Third Circuit subsequently overruled in *Pontarelli* precisely to bring its rule in line with Congress's intent.

thority to evaluate § 925(c) applications in the first instance." *Pontarelli*, 2002 U.S. App. LEXIS 5309, at *34.

Indeed, the legislative history is replete with references to Congress's intent to close the "loophole" in the otherwise blanket prohibition against re-arming felons. It cannot plausibly be suggested that a Congress so devoted to closing this "loophole" intended at the same time to open another by allowing district judges to do what ATF could not—re-arm felons.

Congress feared—following the VPC report—that successful applicants under Section 925(c) would commit further crimes: "After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made." S. Rep. No. 102-353, 19-20 (1992).[11] Legislators repeatedly stressed the potential dangerousness of the existing gun relief legislation. One co-sponsor of the appropriations measure, Senator Lautenberg, declared: "It is also placing innocent Americans at risk. Even after ATF performs a full-blown investigation, there is no way to be sure that a convicted felon isn't going to go out and commit another crime. In fact, there's real cause for concern. Criminals granted relief have later been rearrested for crimes ranging from attempted murder to rape and kidnapping." 138 Cong. Rec. S13241 (daily ed. Sept. 10, 1992) (statement by Senator Lautenberg).[12]

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11 *See also* S. Rep. No. 103-106, at 20 (1993) (using the same language).

12 *See also* H.R. Rep. No. 102-618, at 14 (1992) ("Under the relief procedure, ATF officials are required to guess whether a convicted felon or a person committed to a mental institution can be entrusted with a firearm. . . . [T]he Committee has included language which states that no

Congress thus acted, in the face of mounting public opposition[13] to close this "loophole":

> Most Americans probably would be amazed that this provision is even necessary, Mr. President. How can it be, at a time of rising violence throughout our Nation, that our laws put guns into the hands of convicted violent felons? It defies common sense. But it is true. Let me explain. Generally speaking, as one would expect, felons are prohibited by Federal law from possessing firearms. However, there is a gaping loophole. I call it the "guns for felons" loophole. Under this loophole, convicted felons and others prohibited from possessing firearms may submit an application to ATF.

138 Cong. Rec. S13241 (daily ed. Sept. 10, 1992) (Sen. Lautenberg).[14]

The question in this case is ultimately an issue of statutory construction and congressional intent. As set forth

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appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.").

13 *See $4 Million a Year To Rearm Felons*, Wash. Post, Nov. 27, 1991, at A16 ("In general, such individuals are prohibited from possessing, shipping, transporting or receiving firearms, but a special exception was created to allow the federal government to restore these rights in some circumstances. The loophole was created to save the Winchester Firearms Co.—whose parent company had been convicted in a kickback scheme—from bankruptcy.").

14 *See also Stop Arming Felons Act: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 102d Cong. (1992) (statement by Rep. Smith) ("But in 1965, an unexpected event opened a loophole in this prohibition on guns. . . . [U]nfortunately, this loophole, this exemption designed for one company has been used as a second-chance club by tens of thousands of felons."); 139 Cong. Rec. S10848 (daily ed. Aug. 6, 1993) (statement of Senator Lautenberg) (referring to the "guns for felons" loophole).

above, the text and structure of the applicable statutes make plain that Congress certainly did not envision that, once it prevented ATF from conducting investigations into petitions filed under Section 925(c), federal courts would be able to circumvent the prohibition by "reviewing" the failure of ATF to act, and then themselves grant relief from the disability imposed under Section 922(g). The legislative record confirms this, as members of Congress repeatedly noted that the purpose of the appropriations measures is to close the "loophole" that previously permitted felons to obtain firearms. There is no reason to ascribe to Congress any intention—while closing one loophole—to open another.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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